

(Fed. Cir. 2003); *Constant v. Advanced Micro-Devices Inc.*, 848 F.2d 1560, 1570 (Fed. Cir. 1988). Indeed, no where in the entire specification is the term “prior art” even used.

Moreover, the heading under which the text relied on by the Examiner is “BACKGROUND AND SUMMARY OF THE INVENTION.” See page 1, line 13. How can Applicants’ own invention be admitted prior art? The text from page 5, line 19 to page 6, line 24 is background supplied by the inventors for their own invention. The text starting at page 6, line 25 introduces the remaining text in the section “BACKGROUND AND SUMMARY OF THE INVENTION” as follows: “The present invention meets the above-identified objectives.” Accordingly, this text relied on by the Examiner is not only not admitted prior art, but it also describes Applicants’ own invention.

It is black letter law that the Examiner may not rely on Applicants’ own disclosure as prior art. Thus, the rejection fails. In addition, the arguments which successfully distinguished the claims from Streter in the last response still apply and are included here for convenience.

The Examiner explains that the failed node is the base station in Streter, the failure is the “blocked” base station, and the message is the reporting of blockage factors to the MTSO. The claims distinguish the Examiner’s broad reading of a node failure. The independent claims recite that:

(1) each established connection with a user is handled by an associated data processing circuit,

(2) the detected failure is a failure in a data processing device indicating that the data processing device is not functioning and that it can no longer handle established connections,

(3) each established radio subscriber unit connection is active and ongoing, is associated with one or more radio access bearers, and carries information between a user of the radio subscriber unit and another communicating entity coupled to the external network.

Streter controls a dual mode telephone to register (rescan) with an alternative wireless communications system (see col. 11, lines 25-28) when the current load conditions (as represented by blockage factors) require (see col. 10, lines 38-42). But a dual mode telephone trying to register is not involved in an established connection that is active and ongoing and that carries information between a user of the radio subscriber unit and another communicating entity. Sending a registration message over an access channel would not be understood by a person skilled in the cellular radio communications art as communicating over an established, ongoing, and active connection with the mobile radio user. Registration is a short lived function that occurs without the radio user even knowing about it. Nor is it clear what the another communicating entity coupled to the external network that the user is communicating with in a phone registration operation.

Nor does Streter's blockage factor correspond to a failure in a data processing device indicating that the data processing circuit is not functioning and that it can no longer handle established connections. A failed data processing device responsible for handling one or more active and ongoing mobile radio connections which can no longer handle that connections is different from an overloaded base station or a failed trunk line in the MSTO.

Streter also does not send a message identifying the one or more mobile radio subscriber unit connections being handled by a failed data processing device. The only message identified by the Examiner is the blockage report, and there is no description in Streter that the blockage report includes any identification of existing and ongoing user connections affected by a detected

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failure in a node. The message sent from the cell site processor 60 in Streter to the MTSO 18 is a “blockage factor.”

Regarding the list of active mobile connections included in that message, the Examiner’s attention is directed to claims 6-10, 20, 25-27, and 35-38. That Streter’s MTSO “can determine a list of mobile stations connected to a base station that has blockade factor...” is not the same as Streter disclosing the MTSO determining such a list and sending it anywhere.

The application is now in condition for allowance. An early notice to that effect is earnestly solicited.

Respectfully submitted,

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